

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANTS

686

**UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit**

No. 23,085

No. 23,086

UNITED STATES OF AMERICA,

Appellee

v.

CARL E. HINTON,

Appellant

UNITED STATES OF AMERICA,

Appellee

v.

EUGENE COOPER,

Appellant

**CONSOLIDATED APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 14 1970

Nathan J. Wilson
CLERK

**WILLIAM L. KAPLAN
Attorney for Appellants
6401 New Hampshire Avenue
Hyattsville, Maryland
270-2626**

(i)

TABLE OF CONTENTS

	<u>Page</u>
ISSUE PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE.	1
STATEMENT OF FACTS	1
ARGUMENT	3

The Court erred in permitting an in-court
identification to be made by the witness,
DeWayne Johnson.

CONCLUSION	5
----------------------	---

TABLE OF CASES

<u>Stovall v. Denno</u> , 388 U.S. 293 (1967).	4. 5
<u>United States v. Wade</u> , 388 U.S. 218 (1967)	3

STATUTES

22 D. C. Code 1801(b).	1
22 D. C. Code 2201	1

ISSUE PRESENTED FOR REVIEW

Was an in-custody identification of Defendants, made after their arrest, in non-lineup circumstances, and in the absence of counsel, of sufficient error to warrant reversal, when that identification formed the basis of an in-court identification.

NOTE: This case has not previously been before the Court.

REFERENCES AND RULINGS

Appellants refer the Court to the Trial Court's ruling, at page 56 of the transcript, pertaining to the identification issue.

STATEMENT OF THE CASE

Appellants were indicted in Criminal No. 973-68, and, after trial by jury, were convicted of violating 22 D. C. Code 1801(b), (Second Degree Burglary), and 22 D. C. Code 2201, (Grand Larceny), and sentenced to concurrent terms of imprisonment of two to six years.

STATEMENT OF FACTS

Appellants were arrested (T-54), for burglary of, and larceny from a dress shop in the District of Columbia.

A witness to the occurrence, DeWayne Johnson, lived on the third floor over the dress shop (T-5), and was awakened by noises around 5:00 A.M. (T-6). He saw a number of people in the street, and although he was not wearing his glasses (T-14), he identified someone "whirling around . . . and . . . just got the impression of red. He had a red wig as well as red pants," (T-14).

Shortly thereafter, Appellants were arrested some distance from the store, and the police brought the witness to the scene of the arrest (T-53). The police indicated that the individual, who had red pants, wore a blond wig, rather than a red one (T-27, 29, 58, 62, 67). The witness was ". . . surprised I positively identified because a great many boys of similar appearance, you could get me to swear that the one on the left and ten minutes from now switch somebody else, I wouldn't know the difference." At this confrontation, there was no counsel, and other than the suspects, there were no civilian subjects present to be identified.

The witness obviously based his in-court identification on the earlier confrontation (T-16), and although objection to the identification procedures was not made until a later point in the trial (T-56), the trial court did not take any measures, sua sponte, to insure that the in-court identification was unbiased.

ARGUMENT

THE COURT ERRED IN PERMITTING AN IN-COURT IDENTIFICATION TO BE MADE BY THE WITNESS, DEWAYNE JOHNSON.

In the now well-known case of U.S. v. Wade, 388 U.S. 218 (1967), the Defendant was not represented by counsel at a pre-trial police lineup. The Supreme Court found that it was error to admit an in-court identification of the Defendant based upon a prior police lineup where the Defendant was not represented by counsel. The Court stated that:

"It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." 388 U.S. 218, 226.

As was stated in Stovall v. Denno, 388 U.S. 293,
302 (1967):

"The practice of showing suspects singly to persons for the purpose of identification, and not as a part of a lineup, has been widely condemned."

Clearly the circumstances under which the Defendants were identified in the case at bar, and the subsequent in-court testimony based upon that identification, was so unfair as to require exclusion, and its admission was violative of the Defendant's Constitutional right to a fair trial. It is equally clear that the possibility for a mistake in identification was very possible under the circumstances of this case. In interpreting the rules laid down in Wade and Gilbert, the United States Supreme Court said in Stovall v. Denno, supra, at 297:

"Wade and Gilbert fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel. A conviction which rests on a mistaken identification is a miscarriage of justice. The Wade and Gilbert rules are aimed at minimizing that possibility by preventing the unfairness at the pre-trial confrontation that experience has proven can occur."

At page 298, it was stated by the Supreme Court that:
"We have, therefore, concluded that the confrontation is a 'critical stage', and that counsel is required at all confrontations."

It should also be pointed out that the suspects were under arrest at the time of the identification, and further, that the witness was readily available to the police. Under the circumstances, there is no reason Appellants should not have been given time to retain counsel and subjected to proper identification procedures rather than being identified under conditions which would have made the most innocent of babes suspect. The witness at best had only a poor opportunity to see the perpetrators of the crime. There is no reason why the witness could not have been brought to a properly conducted lineup.

CONCLUSION

Considering the prejudicial circumstances of the identification upon which the in-court testimony was based, and the fact that the Defendants were not

the first of these is the fact that the
the second is the fact that the
the third is the fact that the

the fourth is the fact that the
the fifth is the fact that the
the sixth is the fact that the
the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the
the tenth is the fact that the
the eleventh is the fact that the
the twelfth is the fact that the
the thirteenth is the fact that the
the fourteenth is the fact that the
the fifteenth is the fact that the
the sixteenth is the fact that the
the seventeenth is the fact that the
the eighteenth is the fact that the
the nineteenth is the fact that the
the twentieth is the fact that the

APPENDIX

the first of these is the fact that the
the second is the fact that the
the third is the fact that the

afforded the opportunity to retain counsel, coupled with the clear possibility for a mistake in identification, this Court should reverse the conviction by the trial court.

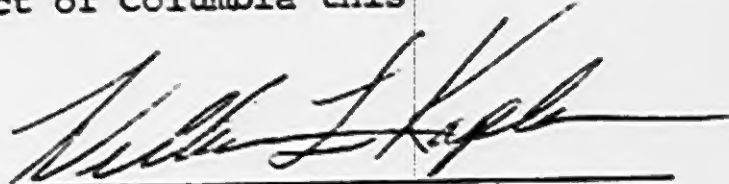
Respectfully submitted,



William L. Kaplan
Attorney for Appellants
6401 New Hampshire Avenue
Hyattsville, Maryland
270-2626

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I hand delivered two (2) copies of the foregoing to the Office of the United States Attorney of the District of Columbia this 14 day of January, 1970.



William L. Kaplan